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BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

RATE ADJUSTMENT DUE TO EXTRAORDINARY OR EXCEPTIONAL CIRCUMSTANCES	)	Docket No. R2013-11R

VALPAK DIRECT MARKETING SYSTEMS, INC. AND VALPAK DEALERS' ASSOCIATION, INC. INITIAL COMMENTS IN RESPONSE TO ORDER NO. 2540
(June 26, 2015)

Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. (hereinafter "Valpak"), hereby submit these Initial Comment in response to Commission Order No. 2540.

I. Commission Remand Proceedings Before Mandate Issues.

PostCom, *et al.*'s Response (June 11, 2015) to the Postal Service Motion to commence proceedings (June 8, 2015) briefly questioned whether the Commission has jurisdiction to commence remand proceedings prior to the Court of Appeals' issuance of the mandate in the appeal. Valpak had planned to address that issue more extensively on June 15, 2015 before the Commission ruled, but was unable to do so as the Commission issued Order No. 2540 before expiration of the seven-day period (39 C.F.R. § 3001.21(b)) allowed for responses to motions. Some of what Valpak would have filed at that time is included herein.

Commission Order No. 2540 responded briefly to this issue, "Pending issuance of the mandate, the Commission is not prevented from considering the impact of the court's opinion on collection of the exigent surcharge. As discussed above, the Commission is establishing procedures that will permit it to act once the court's mandate is issued…. The action taken by

the Commission in this Order is not precluded by the fact that the mandate has not yet issued." The Commission cites no authority for its position.

The Postal Service's motion sought to minimize this significant issue — whether the Commission currently has authority to order the relief requested by the Postal Service — addressing it in a short footnote:

> The Postal Service notes that, in a letter to the Court of Appeals dated May 21, 2015, counsel for the Commission has already asserted that the Commission can entertain requests for relief based on the court's opinion **without awaiting formal issuance of the court's mandate**. The Postal Service agrees, and the instant motion to suspend is thus **plainly** ripe for immediate consideration. [Postal Service Motion, p. 3 n.2 (emphasis added).]

Far from being "plain," the issue is complicated, and the Postal Service's citation to the Commission's F.R.App.P. Rule 28(j) letter to the Court of Appeals does not resolve the issue. The Postal Service ignores the purpose of the Commission counsel's statement in that letter. The Commission counsel's statement that the Postal Service can seek Commission relief prior to issuance of the mandate was only "to relieve the Postal Service of its obligation to notify its customers that the surcharge is scheduled to end…." PRC Letter, p. 1. And that statement itself was premised on "if the Postal Service prevails in this litigation…." *Id*. The Postal Service certainly did not fully prevail, as the Court of Appeals concluded: "we uphold most of Order 1926 as neither arbitrary nor capricious, and as supported by substantial evidence." Alliance of Nonprofit Mailers v. Postal Regulatory Commission, No. 14-1009 (D.C. Cir. June 5, 2015) ("slip op.") at 11. The Postal Service prevailed on only one narrow aspect of its appeal, and therefore is entitled neither to rely upon the Commission counsel's letter nor to receive relief from Order No. 1926 at this time.

Indeed, in another letter to the Court of Appeals, the Postal Service counsel asked the Court to immediately issue the mandate — which the Court declined to do:

> In light of these timing concerns, the Court may wish to consider issuing the mandate along with its opinion rather than withholding the mandate until 7 days after the expiration of the time for filing a rehearing petition. [USPS Letter to Court of Appeals, May 19, 2015, p. 2.]

Postal Service counsel would not have asked the Court of Appeals for immediate issuance of the mandate unless counsel for the Postal Service believed its issuance was legally significant. The Commission itself had urged the Court of Appeals **not** to issue the mandate immediately, noting that such action "would unnecessarily complicate the orderly consideration of whether a petition for rehearing is warranted." The Court of Appeals rejected the Postal Service's suggestion, issuing its standard order withholding issuance of the mandate "until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc … without prejudice to the right of any party to move for expedited issuance of the mandate for good cause shown." *See* ANM v. PRC, No. 14-1009, June 5, 2015 Order. The Postal Service now feigns a lack of concern for the Commission's authority to re-open the docket prior to issuance of the mandate.

Unfortunately, the Commission's own Order No. 2540 unnecessarily complicates proceedings by suspending the 45-day notice requirement, while claiming it maintains the status quo. The status quo consists of an exigent surcharge which expires when the Postal Service reaches the $2.766 billion contribution target. This status quo is not being maintained by Commission Order No. 2540.

The general rule regarding agency authority prior to the mandate being issued is that:

> Although the issuance of the mandate is largely a formality, the court of appeals retains jurisdiction over the case until it issues, and the district court or **agency** whose order is being reviewed **cannot proceed in the interim**. *See*, *e.g.*, 16A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3987, at 735-36 (3d ed. 1999)…. [Youghiogheny & Ohio Coal Co. v. Milliken, 200 F.3d 942, 951-52 (6th Cir. 1999) (emphasis added).]

To be sure, the D.C. Circuit, which has jurisdiction over Commission appeals,[1] in one case took a less strict view of exclusivity of jurisdiction,[2] but still expressed concern about premature administrative action:

> Admittedly, some of the reasons underlying the general principle … that the jurisdictional authority of district courts and courts of appeal are mutually exclusive regarding issues raised on appeal … such as **avoiding confusion** or a **waste of time** by having the same matter considered in more than one forum at the same time … **apply to administrative proceedings**…. [Chamber of Commerce v. SEC, 443 F.3d 890, 897 (D.C. Cir. 2006) (emphasis added).]

The D.C. Circuit stated in Chamber of Commerce that "agencies possess authority to address issues identified by the court prior to the issuance of its mandate," citing several other D.C. Circuit cases. *Id*. at 898. However, those cited cases are readily distinguishable from this case in that in those cases the mandate was withheld pending agency action in order for the court to retain jurisdiction until the agency action was resolved or to prevent complete disruption to the regulatory system. In Hazardous Waste Treatment Council v. EPA, 866 F.2d 355, 371 (D.C. Cir. 1989), the court withheld issuance of the mandate for 90 days, "to avoid disrupting EPA's regulatory program," to permit the agency to withdraw or adequately explain

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[1] 39 U.S.C. § 3663.

[2] The Response of PostCom, *et al*., to the Motion of the Postal Service describes the state of the law as follows: "Whether the Commission has the authority to [issue an order before the mandate issues] is uncertain. 28 U.S.C. § 2349(a) … suggests that the Commission may not regain jurisdiction to act in this docket until the court's mandate issues." *Id*. at 9.

its final rule. In National Coalition against Misuse of Pesticides v. Thomas, 809 F.2d 875, 884-85 (D.C. Cir. 1987), the court ordered the agency to determine whether it could issue an interim rule within 30 days, and withheld issuance of the mandate for 30 days "to prevent further disruption and uncertainty in this difficult and sensitive matter." Likewise, in Independent U.S. Tanker Owners Committee v. Dole, 809 F.2d 847, 855 (D.C. Cir. 1987), the court delayed issuance of the mandate "to avoid further disruptions in the domestic market and to allow the [agency] to undertake further proceedings to address the problems" in that case. Indeed, in Chamber of Commerce, the court vacated the SEC's rule but withheld issuance of the mandate in order to maintain jurisdiction over the case and guide the agency's actions.

Each of those cases is significantly different from the appeal of Commission Order No. 1926 because the Court of Appeals identified no extraordinary circumstances that require the Commission to act before the mandate has been issued. The Court of Appeals controls issuance of its mandate and can choose either to follow the normal rule, to expedite issuance, or to stay issuance. In this case, the Court rejected the Postal Service's request and chose to follow the normal rule and directed issuance of the mandate seven days after the time for filing a petition for rehearing has expired or after an order denying rehearing.[3]

Furthermore, Chamber of Commerce made clear that "avoiding confusion or a waste of time" are reasons that "apply to administrative proceedings." *Id*. at 897. F.R.App.P. Rule

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[3] Comments of APWU (June 11, 2015) (at 2) mistakenly imply that the mandate of the Court of Appeals has already been issued: "To proceed with removal of the exigent rate would amount to a violation of the D.C. Circuit's mandate…."

41(d)(1) provides for automatic stay of issuance of the mandate when a timely petition for rehearing has been filed.[4] Each of the parties — the Commission, the Postal Service, and the mailers — had some aspect of the Court's decision that was adverse to them. Thus, each is currently entitled to file a petition for rehearing (or rehearing *en banc*) with the Court of Appeals or a petition for writ of certiorari in the U.S. Supreme Court. Indeed, further judicial proceedings could affirm Order No. 1926's revenue recovery limitation or even determine that the Postal Service had not been entitled to any exigent increase.

The Postal Service will be made whole, even if the surcharge is temporarily stopped, by imposing some surcharge until it reaches whatever revenue level is ultimately determined allowable. However, as the Response of PostCom, *et al*. correctly pointed out, "if the Commission were to allow the exigent surcharge to remain in effect pending remand, and all or part of the surcharge were ultimately found excessive under 39 U.S.C. § 3622(d)(1)(E), mailers could never recover those amounts. 39 U.S.C. § 3681." *Id*. at 9.

Finally, Order No. 2540 suspends the 45-day notice requirement, which it presents as a product of Order No. 1926, "reexamined and independently confirmed as part of the Postal Service's surcharge removal plan approved by Order No. 2319." Order No. 2540, p. 7. Suspending that notice requirement until after remand proceedings conclude is likely to result in overcharging of the exigent surcharge by the Postal Service, for which there is no remedy for mailers.

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[4] A petition for rehearing is timely if filed within 45 days in a case where a U.S. agency is a party. F.R.App.P. Rule 40(a)(1).

Thus, for the foregoing reasons, the Commission should withdraw that portion of its order waiving the 45-day notice requirement and suspend these proceedings on remand until the mandate issues. The Postal Service should be required to file a notice of removal at least 45 days before it estimates when it will reach the revenue limit determined in Order No. 1926, which is likely to occur in August 2015. If the Postal Service believes it is already within the 45-day window, it should be required to notice the rescission of the surcharge forthwith.

II. Remand Proceedings Should Focus Only on Lost Volume.

The following comments are offered with respect to the Commission's eventual proceedings on remand. The Court of Appeals specifically affirmed the Commission's "new normal" approach, stating: "the 'new normal' rule was well reasoned and grounded in the evidence before the Commission. It comfortably passes deferential APA review." Slip Op. at 17. Thus, the only issue that should be before the Commission on remand is the narrow question of calculating volume lost due to the recession since the Court also ruled that: "the 'count once' rule's controversion of the new normal rule's premises does not [pass APA review] and must be vacated."[5] *Id*. (footnote omitted).

Order No. 2540 acknowledges the limited scope of the Court of Appeals' remand, and appears to focus solely on the issue of recalculating mail volume loss due to the recession, inviting comments "on the Postal Service's methodological approach for accounting for volume

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[5] *See also* Slip Op. at 3 ("We hold that the Commission's 'new normal' determination is reasonable, but its rule that lost mail volumes should be counted only once makes no sense on this record. We therefore grant the Postal Service's petition for review in part.").

losses due to the Great Recession in a cumulative manner" while recognizing parties' APA right to address "any other relevant issues they wish." Order No. 2540 at 7.

The Commission was not misled by that portion of the Postal Service's motion on remand, which badly distorted language from the Court of Appeals' opinion, and asked the Commission to reopen the exigent docket so the Postal Service can completely relitigate issues already settled: "In its opinion, the court left open the question of whether the **totality of Order No. 1926** stated a consistent position…." Postal Service Motion, p. 3 (emphasis added). Further, the Postal Service claimed that "Because, in fact, the Postal Service had no realistic opportunity to make reductions in institutional costs in response to the massive volume declines, the Commission needs to **reconsider its 'new normal' framework**." *Id*. at 4 (emphasis added).

Indeed, the Court of Appeals' opinion had actually said that the Commission was "free to consider … on remand" the Postal Service's last minute argument (raised only at oral argument) that the Commission's "new normal" analysis was inconsistent with its "necessary" analysis. *See* Slip Op. at 17, n.3. However, in no way does footnote 3 call into question the legitimacy of the "new normal" analysis when the Court's opinion elsewhere explicitly endorsed it. But that is exactly what the Postal Service tried to make it do, attempting to transform the footnote molehill into a mountain of "whether the totality of Order No. 1926 stated a consistent position." Postal Service Motion, p. 3.

The Postal Service Motion also misstates its own position as set out in its briefs to the Court of Appeals, claiming that its briefs argued "very forcefully" that the Commission's

"new normal" analysis was inconsistent with the Commission's "necessary" analysis.[6] *Id*. at 4 n.3. Actually, the Postal Service's briefs argued that Order No. 1926 "**conflated**" the two analyses, which is quite distinct from an argument that the two analyses are **inconsistent**. *See* Postal Service Petitioner's Brief (Apr. 15, 2014) at 17 ("The Commission's 'new normal' analysis also conflates the different elements of the exigent-rate provision.") and at 31 ("The very test the Commission fashioned underscores that its new normal inquiry conflates distinct parts of the statute."); and Postal Service Reply Brief (July 10, 2014) at 11 ("Despite arguing that it did not conflate the statutory criteria, the Commission proves otherwise…. The Commission's 'new normal' rule artificially cabins the scope of the 'due to' inquiry based on considerations that plainly belong in the 'necessary' inquiry."). The Court made no mistake in explaining that the Postal Service's inconsistency "argument was not raised in the Postal Service's briefs, and is not properly before this court."[7] The "necessary" issue was settled in Order No. 1926, and the Postal Service did not assert any inconsistency on appeal.

III. The Postal Service's Mechanical Volume Tally is Inconsistent with the Court of Appeals' Opinion.

The Court of Appeals rejected the "count once" rule, pointing to some of the "new normal" factors used in Order No. 1926, and explaining that "There is no reason that the **same considerations**, rather than a **mechanical tally** of the time passed since the recession, could

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[6] *See* Response of PostCom, *et al.* (June 11, 2015) at 5 n.2.

[7] If the Postal Service really believes the Court of Appeals made a mistake in its opinion, it could easily file a petition for rehearing with the Court and publish a notice of removal of the exigent surcharge.

not **guide the Commission's determination** of when to stop counting lost mail volume."[8] Slip Op. at 17 (emphasis added).

Now, the Postal Service proposes its own "mechanical tally," asking for volume losses to be counted cumulatively in each consecutive year, as if it had been impossible for the Postal Service to adjust any of its operations on account of exigent circumstances. It explains that simply "eliminating the 'count once' rule" means that "actual annual volume loss in each year is the combination of volume first lost in that year, plus annual volume lost in the previous year…." Postal Service Motion, p. 5. The Postal Service calls this an "absolute floor" — indicating it likely intends to ask for even more money at some point[9] — but does not apply a "new normal"-like analysis to lost volume being claimed over multiple years or to the Postal Service's efforts over those same years to adapt its operations to the new normal.

In a sense, the Postal Service's mechanical counting of prior year losses 100 percent in each subsequent year has much in common with the count-once methodology. However, the Court of Appeals would rather the Commission use its expertise — as it did with its "new normal" analysis — to "guide the Commission's determination of when to stop counting lost mail volume." Slip Op. at 17.

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[8] The Court of Appeals provided a simple example of a laid off worker who canceled her cable subscription and no longer mails her monthly payment: (i) the Commission would count 12 pieces of lost mail; (ii) the Postal Service would count 48 pieces of mail over four years. *Id*. at 15-16. The Court rejected the Commission's rule, but never endorsed the Postal Service's methodology either.

[9] *See* Postal Service Motion at 4 ("Emerging from a necessary reconsideration of the 'new normal' framework should be an appropriate contribution estimate that is well above $3.957 billion.").

IV. The Postal Service Has Thus Far Failed to Correctly Estimate Volume Loss Due to the Recession.

The Commission's "count once" procedure rejected by the Court should be replaced by a methodology that comports with the Commission's "new normal" analysis in Order No. 1926 that the Court explicitly sanctioned.

The Postal Service's Motion does not challenge the annual **gross** reduction in volume as estimated by the Commission for FY 2008-FY 2012 and reproduced in the (unnumbered) table on page 5 of the Motion. Instead, the Postal Service Motion uses the Commission's estimate of the annual **gross** reduction to compute what it believes to be the reduction in volume if (i) the "count once" procedure is eliminated, and (ii) no other adjustments are made. The Postal Service's result is shown in a second (unnumbered) table on page 6 of its Motion. According to the Postal Service, elimination of the "count once" procedure entitles it to count at full value the estimate of all subsequent lost volume in each class of mail right up to the time the "new normal" is reached. As stated in the Motion:

> merely by eliminating the "count once" rule and recognizing that the actual annual volume loss in each year is the combination of volume first lost in that year, plus annual volume lost in the previous year, the "total impact" volume loss estimate increases from 25.2708 billion pieces to 35.0877 billion pieces. [*Id.*, p. 5.]

The Postal Service's motion goes on to represent that:

> Because, in fact, the Postal Service had **no realistic opportunity to make reductions in institutional costs** in response to the massive volume declines, the Commission needs to reconsider its "new normal" framework. [*Id.*, p. 4 (emphasis added).]

The Postal Service's representation to the Commission that it had no realistic opportunity to cut costs is disproved by the reality that the Postal Service actually did make considerable cost reductions during the recession as well as after it ended.[10]

Neither the Postal Service's unnumbered table on page 6 nor the accompanying discussion makes clear that elimination of the "count once" rule results in counting lost volume one, two, or more **additional** times beyond "count once." Such a calculation can be accomplished in a straightforward manner, and is shown in Table 1, Postal Service's Claimed Gross Estimate of Lost Volume Due to Great Recession.[11]

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[10] *See*, for example, the discussion under "Results of Operations" in USPS 2008-2010 Reports on Form 10-K.

[11] Table 1 is an expanded version of the Postal Service's table set out on page 6 of its Motion. Note that the total volume loss in this table (35,087.8 million pieces) corresponds with that claimed by the Postal Service in its table.

Table 1

Postal Service's Claimed Gross Estimate of Lost Volume Due to Great Recession
Year-over-Year Unadjusted Changes Due to the Great Recession (Count Once eliminated), Annual Totals per USPS
(Market Dominant Mail, millions of pieces)

	FY2008	------- FY2009 -------			---------- FY2010 ----------				---------- FY2011 ----------					2008-2011
	First Time (1)	First Time (2)	Second Time (3)	Annual (4)	First Time (5)	Second Time (6)	Third Time (7)	Annual (8)	First Time (9)	Second Time (10)	Third Time (11)	Fourth Time (12)	Annual (13)	Total (14)
First-Class Mail	-582.7	-1,864.0	-582.7	-2,446.7	-1,043.3	-1,864.0	-582.7	-3,490.0	0.0	0.0	0.0	0.0	0.0	-6,519.4
Standard Mail	-5,350.0	-15,572.0	-5,350.0	-20,922.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-26,272.0
Periodicals	-110.3	-377.1	-110.3	-487.4	-352.3	-377.1	-110.3	-839.7	-15.9	-352.3	-377.1	-110.3	-855.6	-2,293.0
Package Services	0.0	-3.4	0.0	-3.4	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-3.4
TOTAL	-6,043.0	-17,816.5	-6043.0	-23,859.5	-1,395.6	-2,241.1	-693.0	-4,329.7	-15.8	-352.3	-377.2	-110.3	-855.6	-35,087.8

Source: USPS Motion to Suspend Exigent Surcharge Removal Provisions of Order No. 1926 and Establish Remand Proceedings, p. 6, table (unnumbered).

As can be seen readily from Table 1, by 2010 the Postal Service was counting some lost mail volume not only twice, but also a third time. And by 2011 some lost volume in the Periodicals class was even being counted a fourth time (at full value).[12] Breaking out the number of times lost volume is counted by the Postal Service is what distinguishes Table 1 from the unnumbered table on page six as presented by the Postal Service.

The question before the Commission is whether lost volume, when it is being counted for the second, third, or even fourth time deserves the same weight — while the Postal Service is adjusting to the new normal — as when lost and counted the first time. The Postal Service table obviously prefers its "mechanical tally" to give full weight to lost volume until the "new normal" is reached. However,

> For the Great Recession, the Commission concludes that the "new normal" point in time is when all or most of the following occur: … (4) the Postal Service demonstrates an ability **to adjust operations to the lower volumes.** [Order No. 1926, p. 86[13] (emphasis added).]

Order No. 1926 focused exclusively on the Total Factor Productivity ("TFP") as a "good measure of the Postal Service's ability to adjust to changing circumstances." *Id*. at 94. The Court of Appeals viewed TFP as a better measure than a "mechanical tally." Slip Op. at 17. However, there are other methods.

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[12] This statement is consistent with the Postal Service's original position that it should be allowed to count mail volume, once lost, as lost forever (or at least until or beyond 2020), thereby totally emasculating the rate cap. The Court did not agree with that contention. Slip Op. at 13.

[13] The Postal Service also discusses the importance of the recognizing that "USPS had been aggressively cutting costs and increasing efficiency." USPS Motion, p. 4, fn,1. But the Postal Service does not suggest that any of its adjustments towards the new normal should affect its claim for lost volume.

Table 2, Postal Service Adjustment to Reduced Volumes, reveals the demonstrated ability of the Postal Service to adjust to decreased volume.

Table 2

Postal Service Adjustment to Reduced Volumes
2007 – 2012
(Number of employees)

	Total Career Employees (1)	Total Noncareer Employees (2)	Total Employees (3)
2007	684,762	101,167	785,929
2008	663,238	101,850	765,088
2009	523,128	88,954	712,082
2010	593,908	87,779	681,687
2011	557,251	88,699	645,950
2012	528,458	100,570	629,028

Source: Postal Service 2010 and 2012 Reports on Form 10-K, pp. 75 and 107, respectively.

That table shows the annual number of career and non-career employees as reported in the Form 10-K reports. Labor represents about 80 percent of the Postal Service's annual operating costs. Meaningful efforts to reduce costs and adjust operations therefore should be reflected in the number of employees. Moreover, the Postal Service also had ongoing efforts to reduce costs in ways other than reducing employee headcount. For example:[14]

- Reduction in overtime hours;
- Reduction in transportation costs;

[14] *See* USPS 2009 Report on Form 10-K, p. 12.

- Limits on spending for supplies and services, travel, and other discretionary items.

Rather than rely on the Postal Service to quantify all these other items, the number of total employees, shown in column 3, can be viewed as a reasonable proxy for all of the Postal Service's cost reduction efforts.

The Postal Service may have been unable to achieve full, immediate adjustment to the recession, as claimed. But Table 2 demonstrates that it continuously and successfully adjusted its operations toward the new normal both during the recession and after it ended in June, 2009.

Conclusion

For all these reasons, the Postal Service's demand to be allowed full credit for volume losses over multiple years while costs were actually being reduced significantly must be rejected.

Respectfully submitted,

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